

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-336 Decided May 31, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming issuance of Notice of Violation No. 84-03-006-012. TU 5-2-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement is a preventative measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation. A violation may be established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or silt- ation structure, and that it will leave the permit area.

Alpine Construction Co. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988), modified.

APPEARANCES: Mark Secrest, Esq., Assistant General Counsel, Muskogee, Oklahoma, for Turner Brothers, Inc.; Nell Fickie, Esq., Department Counsel, Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Turner Brothers, Inc. (TBI), has appealed from a decision dated January 24, 1986, by Administrative Law Judge Frederick A. Miller affirming two violations cited in Notice of Violation (NOV) No. 84-03-006-012 issued September 27, 1984, at TBI's Welch No. 1 and No. 1B mines in Craig County, Oklahoma.

Pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. | 1275 (1982), TBI filed an application for review of the NOV; the Office of Surface Mining Reclamation and Enforcement (OSMRE) filed an answer; and the matter was heard before Judge Miller in Tulsa, Oklahoma, on September 18, 1985.

[1] TBI's first argument on appeal is that OSMRE lacked jurisdiction to issue the NOV because it failed to provide proper notice as required by the Administrative Procedure Act (APA), 5 U.S.C. | 553(d) (1982), when it attempted to assume primary enforcement responsibility for surface coal mining operations in Oklahoma. In his decision, the Judge stated that this issue had been addressed in previous TBI appeals and ruled that OSMRE had jurisdiction to enforce the Oklahoma Permanent Program Regulations (OPRPR).

Judge Miller's ruling was correct. TBI's arguments regarding jurisdiction are identical to those addressed by this Board in Turner Brothers, Inc. v. OSMRE, 100 IBLA 365 (1988), and Turner Brothers, Inc. v. OSMRE, 99 IBLA 349 (1987), among others. As in the previous Turner Brothers cases, we affirm Judge Miller's dismissal of TBI's challenge to OSMRE's jurisdiction.

Next, TBI contends that OSMRE failed to establish a prima facie case with respect to violation No. 1 cited in the NOV. 1/ Violation No. 1 alleged that the operator had failed to direct all water from disturbed areas to a sedimentation pond in violation of section 816.42(a)(1) of the OPRPR. 2/ The NOV stated that this violation was occurring on the north and east sides of the coal pad on permit No. 82/86-4049, on the north and south berms directed to pond No. 2, and on diversion No. 1 directed to pond No. 4 on permit No. 84/86-4090.

TBI contends that in order to establish a prima facie case of a violation of section 816.42(a)(1) of the OPRPR, OSMRE was required to establish a prima facie case as to each of the elements of the violation, which, as enunciated in Avanti Mining Co., 4 IBSMA 101, 107, 89 I.D. 378, 381 (1982), are: (1) The existence of surface drainage from areas disturbed in

1/ Appellant does not challenge Judge Miller's decision to the extent that it affirmed violation No. 2 (failure to certify a sedimentation pond).

2/ This regulation is the same as 30 CFR 717.17(a)(1) and 30 CFR 816.46(b)(2) which requires that all surface drainage from disturbed areas shall be passed through a sedimentation pond or a siltation structure prior to leaving the permit area during the interim program and permanent program, respectively. We note, however, that by notice in the Federal Register, 51 FR 41961 (Nov. 20, 1986), the Department suspended 30 CFR 816.46(b)(2).

the course of mining and reclamation activity; (2) that such drainage was not passed through a sedimentation pond; and (3) that such drainage flowed off the permit area. TBI argues that OSMRE failed to establish the existence of surface drainage in disturbed areas or that such drainage flowed off the permit area without passing through a sedimentation pond. TBI contends that OSMRE must show a likelihood, not mere speculation, that the harm designed to be prevented by the regulation will occur.

OSMRE contends it established a prima facie case that the violation occurred in all three areas.

The Board in Alpine Construction Co. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988), recently addressed the type of proof that is necessary to establish a violation of 30 CFR 717.17(a)(1). We stated that the elements of proof required to support such a violation are (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left or will leave the permit area. Thus, we concluded that proof that surface drainage has actually left the permit area is not mandatory. In so holding we expressly overruled to the extent inconsistent Avanti Mining Co., supra; Consolidation Coal Co., 4 IBSMA 227, 89 I.D. 632 (1982); and Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987).

At the hearing before Judge Miller, OSMRE Inspector Joseph Funk testified that there were no drainage controls on the coal pad and therefore water had a potential to flow off the minesite without passing through a

sedimentation pond. He described the coal pad as a disturbed area, a coal loading facility with coal piles and coal trucks entering and leaving (Tr. 10). He indicated that the area of the coal pad was higher than the area immediately to the north of it and described the potential drainage as follows:

A. Okay. On the east side is relatively flat. The drainage could potentially go anywhere. It could stay there, it could go west or it could go east off the permit line. * * * On the north side of the permit line it's a very very moderate slope, but there would be a flat area right in the permit -- right on the -- I'm sorry. There would be a flat area where the permit boundary right on the edge of disturbance and immediately north of it is a low spot between the permit line and the highway. So, once again water could go any way, but from a high point to a low point I would say it would have a more likely chance of flowing north into that low spot from the disturbed area.

(Tr. 14-15).

The inspector stated there were no diversions or berms to prevent the surface drainage from leaving this area without first passing through a sedimentation pond. Although he saw no drainage flowing off the site, the inspector explained his conclusion that such drainage could occur as follows: "By looking at the site out in the field I could see the low spot north of the permit boundary where water would obviously have a potential to flow to it" (Tr. 16).

The Judge concluded from Inspector Funk's testimony that OSMRE demonstrated surface drainage would flow north and off the permit area without first passing through a sedimentation pond.

A second area involving this violation was described as being the area west of sedimentation pond No. 2 on permit No. 84/86-4090. The inspector testified with reference to a topographical map (Exh. R-6) on which he entered approximate elevations and by means of arrows depicted potential drainage flow lines. He stated that although no berms or diversions were required by the permit, there was a disturbed area west of pond No. 2 which would result in some uncontrolled drainage downhill and behind the pond dam (Tr. 20). The inspector surmised that drainage had the potential of leaving the permit site without flowing through a sedimentation pond (Tr. 21-22).

TBI's mining engineer Gregory Govier testified that a north-south haul road in area 2 was constructed for the purpose of holding water in the permit area. He testified also that some areas on the downhill slope of the haul road were disturbed and unvegetated (Tr. 45).

Judge Miller found that the haul road was not a completed drainage retention structure because areas to the west of it would allow surface drainage to flow off the permit area without first passing through a sedimentation pond. As to area 2, he concluded that OSMRE had presented a prima facie case that was not overcome by contradictory evidence.

The third area involving this violation is an area labelled diversion No. 1 located south of pond No. 2 and west of pond No. 4 (Exh. R-6). The inspector testified that diversion No. 1 had not been constructed but that it was needed because the entire watershed to the east of it had been disturbed but not vegetated (Tr. 22). He indicated that without the diversion,

water would run off the permit because it could not be directed either to pond No. 2 or pond No. 4. He cited this area as an area of violation because the watershed had been mined and disturbed, but drainage was not being directed to a sedimentation pond before leaving the permit area (Tr. 24). TBI presented no testimony in regard to diversion No. 1 and the Judge again concluded that OSMRE had presented a prima facie case of the existence of a violation in this area.

In his evaluation of the evidence, Judge Miller stated that the sedimentation pond requirement is a preventive measure which does not require a showing of the harm it is intended to prevent in order to establish a violation. He found also that an inspector need not see surface drainage leaving the permit area so long as he testifies that drainage could flow off the permit without first passing through a sedimentation pond.

[2] In Alpine Construction Co. v. OSMRE, supra, we dealt with the situation in which the OSMRE inspector could not specifically testify that surface drainage had left the permit area. Nevertheless, based on the rationale that the sedimentation pond requirement is a preventative measure, we held that testimony that surface drainage would leave the permit area was sufficient to establish a prima facie case in support of a violation.

In the present case the inspector did not see any surface drainage from disturbed areas at the time of his inspection nor did he find any evidence that any drainage had left the permit area. However, his testimony established for all three areas that there was a reasonable likelihood that there

would be surface drainage from those areas, that it would not pass through a sedimentation pond, and that it would leave the permit area. Appellant did not rebut that testimony.

Thus, consistent with the rationale which formed the basis for our holding in Alpine Construction Co. v. OSMRE, supra, we conclude that evidence that there is a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area is sufficient to establish a prima facie case of a violation of the regulations.

Since our conclusion represents a clarification of the evidence necessary to establish a prima facie case, we expressly modify Alpine Construction Co. v. OSMRE, supra, to incorporate our holding in this case.

Based on our review of the record, we conclude that Judge Miller correctly found that OSMRE established a prima facie case that a violation existed in each of the three areas, and that TBI failed to meet its burden of persuasion that the violation did not occur. See Turner Brothers, Inc. v. OSMRE, 100 IBLA 365, 370 (1988); Alpine Construction Co. v. OSMRE, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

